No. 89-839

In The
Supreme Court of the United States
October Term, 1989

STATE OF ARIZONA,
Petitioner,

--against--

ORESTE C. FULMINANTE,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT
OF ARIZONA

MOTION TO FILE BRIEF AND BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., THE NATIONAL SHERIFFS' ASSOCIATION, INC., AND THE LINCOLN LEGAL FOUNDATION, IN SUPPORT OF THE PETITIONER.

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This motion and brief is filed pursuant to Rule 37 of the United States Supreme Court. Consent to file has been granted by Counsel for the Petitioner. As of the time of the printing of this motion and brief, consent ~~has not been received~~ refused from the Respondent. The letter of Consent of Petitioner has been filed with the Clerk of this Court, as required by the Rules.

Come now *Americans for Effective Law Enforcement, Inc., et al.,* and move this Court for leave to file the attached brief as *amici curiae,* and declare as follows:

1. *Identity and Interest of Amici Curiae.* The *amici curiae* are described as follows:

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* over eighty-five times in the Supreme Court of the United States, and thirty-eight times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 72 nations. Through its programs of training, publications, legislative reform and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time

protecting the rights of all our citizens.

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, **NDAA's** programs of education, training, publications, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The National Sheriffs' Association Inc. (NSA), is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the Nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

The Lincoln Legal Foundation (LLF) is a national, nonprofit, nonpartisan, public-interest law center which undertakes litigation, administrative proceedings, legal studies, and educational activities in matters promoting political, economic, and civil liberties; preserving constitutional government, including the separation and limitation of governmental powers; and defending the rights of innocent victims of crime.

2. *Desirability of an Amici Curiae Brief. Amici* are professional associations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of adopting and implementing guidelines for the conduct of interrogations; (2)

prosecutors, county counsel and police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters and to prosecute cases involving evidence obtained thereby; and (3) members of the business and professional communities devoted to the goal of effective law enforcement.

Because of the relationship with our members, and the composition of our membership and directors -- including active law enforcement administrators and counsel at the state and national level -- we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court. We respectfully ask this Court to consider this information in reaching its decision in this case.

3. *Reasons for Believing that Existing Briefs May Not Present All Issues.* **AELE, IACP, NDAA, NSA,** and **LLF** are state and national associations, and their perspective is broad. This brief concentrates on policy issues, including the values served by the adoption of reasonable rules for guiding police conduct in the law of interrogation. Although Petitioner is clearly represented by capable and diligent counsel, no single party can completely develop all relevant views of such issues as these.

4. *Avoidance of Duplication.* Counsel for *amici curiae* has reviewed the facts of this case and has conferred at length with counsel for Petitioner in an effort to avoid unnecessary duplication. It is believed that this brief presents issues that are not otherwise raised.

5. *Consent of Parties or Requests Therefor.* Counsel has requested consent of the parties. The consent of Petitioner has been received and filed with the Clerk of

this Court. This Motion is necessary because the Respondent has not as of the time of printing of the Brief granted consent to *amici* in writing. Should it be received thereafter, it will be filed by counsel with the Clerk of this Court with a request that this motion be withdrawn and the brief be deemed filed with the consent of all parties.

For these reasons, the *amici curiae* request that they be granted leave to file the attached *amici curiae* brief.

Respectfully submitted,

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INTEREST OF AMICI

See Section on Identity and Interest of *Amici Curiae, supra.*

STATEMENT OF FACTS

The facts, as stated in the Arizona court's opinion, *State v. Fulminante,* 161 Ariz. 237, 778 P.2d 602 (1988), revealed that the respondent-inmate (hereinafter referred to as "defendant") had been a suspect in the killing of his step-daughter, but no charges had been filed against him.

While the defendant was in a New York prison on a weapon's possession conviction, he became friends with another inmate, Anthony Sarivola, who was serving a 60 day sentence for extortion. Sarivola, with an organized crime background, had become an F.B.I. informer; and while in prison, he was posing as an organized crime figure.

After Sarivola and the defendant became friends, Sarivola heard a rumor that the defendant had been suspected of killing a child. This the defendant denied, but the rumor was passed on to Sarivola's F.B.I. contact, who instructed Sarivola to find out more about it.

According to Sarivola, defendant had been receiving "rough" treatment from other inmates because of the rumor, so Sarivola suggested to the defendant that if defendant told Sarivola the truth he would "give him help." Defendant then admitted the child killing and supplied details about it.

Sarivola was released from prison in November, 1983; defendant was released in May, 1984. Sarivola and his fiancee, Donna, picked up defendant at a local bus stop

and he was asked if he had any relatives he wished to see, whereupon defendant said he couldn't return home because he had killed a little girl in Arizona. They then drove defendant to a friend's house in Pennsylvania. Later he was arrested in New York on another weapon's possession charge.

Upon indictment for the child murder, defendant sought to suppress the statements he had made to Sarivola, and to him and Donna. Suppression was denied, defendant was found guilty, and he was sentenced to death. He appealed.

Initially the Arizona Supreme Court affirmed the conviction and sentence, 161 Ariz. 237, 778 P.2d 602 (1988). Then, in a "supplemental opinion," 778 P.2d at 626, three of the five Justices vacated the conviction and remanded the case for retrial without the use of "the original coerced confession" made while in prison. (One of the Justices did not participate in the supplemental ruling; another had retired before the supplemental opinion was rendered. The remaining Justice dissented).

In its first opinion, the Arizona Supreme Court had held that while the defendant's confession to Sarivola was inadmissible as evidence because of its coercive nature, the second one was not the fruit of the poisonous tree and consequently had been properly admitted. The erroneous admission of the first confession, though a "coerced" one, was considered harmless error. However, in the supplemental opinion, the court reversed its position, deciding that the harmless error doctrine could not be applied to a coerced confession.

The dissenting Justice Cameron, 778 P.2d at 628, contended that the harmless error doctrine was applicable to involuntary confessions, and not just to *Miranda*-flawed ones. He was of the view that the federal

cases upon which the majority now relied were "not sound authority for its ruling." 778 P.2d at 628. He stated that only three of the cited cases were of any relevance. They were ones that involved confessions obtained by the police under circumstances "that resulted in the defendant being in a weakened, vulnerable physical condition and the police using coercive pressure through intensive interrogation to elicit a confession." 778 P.2d at 629. According to Justice Cameron, the police tactics in those cases violated due process of law and, therefore, mandated rejection or usage "in any way" against a defendant.

ARGUMENT

I. DEFENDANT'S CONFESSION WAS NOT COERCED; THE PROMISE MADE TO HIM BY A FELLOW PENITENTIARY INMATE (A GOVERNMENT INFORMER) DID NOT PRESENT "A SUBSTANTIAL RISK OF A FALSE CONFESSION." IT CONSISTED OF A STATEMENT THAT THE INMATE WOULD PROTECT DEFENDANT FROM OTHER PRISONERS WHO SUPPOSEDLY HAD BEEN GIVING HIM "ROUGH" TREATMENT BECAUSE OF A RUMOR THAT DEFENDANT HAD KILLED A CHILD.

II. EVEN IF THE CONFESSION HAD BEEN COERCED BY THE INFORMER'S PROMISE, ITS ADMISSION INTO EVIDENCE AT THE CHILD MURDER TRIAL WOULD HAVE CONSTITUTED HARMLESS ERROR, BECAUSE THE TOTALITY OF CIRCUMSTANCES ESTABLISHED OVERWHELMING EVIDENCE OF GUILT.

Amici will not discuss at length the case law analysis of the Petitioner State of Arizona in this case, although we agree with that analysis. Instead, we will concentrate upon policy issues raised by this case and our need as law enforcement administrators and concerned members of Society to ensure that law enforcement officers have sufficient guidance in the area of permissible interrogation techniques.

We note, initially, that promises *per se* do not categorically nullify a confession. A clear example, and a generally accepted one, is a promise of secrecy, as, for instance, one made to a suspect who requests that his mother not be told of his criminal act. (Actually, a promise of such secrecy affords added assurance of truthfulness.) Other promises that are treated in a

similar fashion are promises to recommend light bail, or a promise to seek psychiatric treatment after the suspect's incarceration. Core references and a general discussion of the legal effects of promises may be found in Inbau, Reid, and Buckley, *Criminal Interrogation and Confession,* (3d ed. 1986) at pp. 214, 315-318. Also, as regards such promises as psychiatric help, see *Miller v. Fenton,* 796 F.2d 598 (3rd Cir. 1986), in which the court held that this kind of promise did not produce "psychological pressure strong enough to overbear the [defendant's] will." (p. 613)

Amici suggest to this Court that the best and fairest test regarding promises is in a New York statute: Does the promise present a "substantial risk" of a false confession. Article 60.45, *Criminal Procedure Law,* Book 11-A, McKinney's Consolidated Laws of New York. Such a test also has the merit of giving the police reasonably clear guidance in this area of interrogation.

In the instant case the defendant never expressed to the prison guards or its officials that he had any fear of harm from other inmates. He knew only what the informer told him about a "rumor" within the prison. This information, and a promise to give him help, presented no "substantial risk" of the defendant making a false confession.

The confession the defendant made after his release from prison was considered by the lower courts to be voluntary and free from any taint of the original one. It, therefore, presents no problem to this Court.

With regard to the "harmless error" issue, the discussion in the dissenting opinion of Justice Cameron clearly supports the position that the doctrine applies to involuntary confessions as well as to *Miranda*-flawed ones. He points out that the decisions of this Court

holding the "harmless error" rule inapplicable to involuntary confessions all involved egregious police conduct that amounted to a violation of due process. And in *Milton v. Wainwright,* 407 U.S. 371 (1972), this Court actually applied a harmless error analysis in a claim by a habeas corpus petitioner that his confession was involuntary as well as being in violation of the Sixth Amendment right to counsel. Other courts have followed the lead of *Milton* in applying a harmless error analysis to claims of involuntary confessions. *E.g., United States v. Carter,* 804 F.2d 487 (8th Cir. 1986); *Harrison v. Owen,* 682 F.2d 138 (7th Cir. 1982); *State v. Childs,* 430 N.W.2d 353 (Wis. App. 1988); *State v. Dean,* 363 S.E.2d 467 (W.Va. 1987); *Hinshaw v. State,* 393 So. 2d 762 (Ala. 1981). *See also, Meade v. Cox,* 438 F.2d 323 (4th Cir. 1971); *United States ex rel. Moore v. Follette,* 425 F.2d 925 (2d Cir. 1970), *cert. denied,* 398 U.S. 966; *People v. Ferkins,* 116 A.D.2d 760, 497 N.Y.S.2d 159 (1986); *State v. Casteneda,* 150 Ariz. 382, 724 P.2d 1 (1986); *Kelley v. State,* 470 N.E.2d 1322 (Ind. 1984); *State v. Johnson,* 35 Wash. App. 380, 666 P.2d 950 (1983); *People v. Gibson,* 109 Ill. App. 3d 316, 440 N.E.2d 339 (1982).

One of the recent federal cases, in which this Court denied certiorari, is *United States v. Murphy and Stauffer,* 763 F.2d 202 (6th Cir. 1985), *cert. denied,* 474 U.S. 1063. In *Murphy* the defendant made incriminating statements while he was being apprehended by an attacking police dog but without police misconduct or interrogation. The Circuit Court ruled the statements were inadmissible as evidence, but the admission of them was harmless error in view of the overwhelming evidence of guilt.

The decisions in *Milton* and subsequent cases are adequately supportive of the applicability of the harmless error doctrine in involuntary confession case situations. This rule is necessary to assure that all segments of the criminal justice system--from police to courts--have

adequate and reasonable guidance on the topic. The police, in particular, while not desirous of ever violating the constitutional rights of interrogated suspects, must have some guidance to the effect that good faith violations of highly technical rules will be subjected to reasonable rules of admissibility and trial error. The "harmless error" rule as applied broadly to confessions is such a reasonable rule.

CONCLUSION

In the absence of egregious police conduct that would come within the orbit of violations of due process, *amici* urge this Court to reverse the ruling of the court below and hold that the admission of defendant's original confession was (a) properly admitted in evidence, or (b) even if it were considered inadmissible, its admission was harmless error. We most certainly share Justice Cameron's view that the costs of applying the exclusionary rule in this case should not be ignored. "[C]onsidering the costs and benefits," he stated, the costs are too great and the benefits negligible.

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